88-1251

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

HECTOR FABIO VELEZ, JOHNNY VELEZ-POSSO, JOSE GUEVARA-BAUTISTA, FAROUK HERNANDEZ, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented For Review

1. Does the Due Process Clause of U.S. CONST. Amend. V require that a federal court accord a criminal defendant in a non-capital case, individualized sentencing consideration and an individually-fashioned sentence, without regard to, or reliance upon, fixed, rigid sentencing rules or policies?

The Parties Below

The parties to the proceedings in the Court below are all set forth in the caption of the case in this Court.

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HECTOR FABIO VELEZ, JOHNNY VELEZ-POSSO, JOSE GUEVARA-BAUTISTA and FAROUK HERNANDEZ, JR. jointly petition for a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit which affirmed respective judgments of conviction entered in the United States District Court for the Eastern District of New York.

Order Below

An unpublished Memorandum Opinion and Summary Order was issued by the United States Court of Appeals for the Second Circuit on November 28, 1988. In that Memorandum and Order, the Court of Appeals affirmed respective judgments of conviction, entered against Petitioners in the United States District Court for the Eastern District of New York, and remanded the case to the District Court solely to allow the District Court to attach the transcripts of the sentencing proceedings to Petitioners' presentence investigation reports.

The Memorandum Opinion and Summary Order of the Court of Appeals is set forth in the Appendix at page 1a-4a.

Jurisdiction

The Memorandum Opinion and Summary Order of the Court of Appeals affirming the judgments of the District Court was dated and filed on November 28, 1988.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

Amendment V—Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement Of The Case

VELEZ, VELEZ-POSSO, GUEVARA-BAUTISTA, IRLANDA GUEVARA and HERNANDEZ were initially charged jointly in a five-count indictment alleging a conspiracy to distribute and possess with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 841 and 846. Counts two through five further charged substantive possession of separate and aggregated quantities of cocaine on November 5, November 5, November 5, and October 30, 1987, respectively, all in contravention of 21 U.S.C. § 841.[1]

On February 22, 1988, Petitioners waived indictment and pled guilty to a one-count superseding information alleging a violation of 21 U.S.C. §§ 846 and 841(b)(1)(C), Con-

1. IRLANDA GUEVARA is not a party to the instant Petition.

spiracy to Distribute, and to Possess with Intent to Distribute, an unspecified quantity of cocaine.

On June 15, 1988, after pre-sentence investigation reports and pre-sentence memoranda had been submitted to the sentencing judge, all four petitioners appeared before the District Court for sentencing. In announcing the sentence of VELEZ, the maximum custodial term of Twenty (20) years and a fine of $100,000.00, the District Judge stated, in pertinent part, ". . . My normal rule of thumb which is just a rule of thumb, dosen't necessarily mean in this case, is a kilo a year . . ." (Transcript of proceedings of June 15, 1988 at page 12, reproduced at page 8a of the Appendix). During the sentencing of VELEZ-Posso, which immediately followed, the sentencing judge remarked, ". . . I am going to impose a 15-year sentence on him . . . in view of the large quantity of cocaine. . ." (Transcript of proceedings of June 15, 1988 at page 12, reproduced at page 10a of the Appendix).

In sentencing GUEVARA-BAUTISTA, the District Court remarked in pertinent part, ". . . I am going to sentence Mr. Bautista to a 12-year prison term . . . in light of the crime he committed. . ." and in imposing sentence upon HERNANDEZ stated, ". . . I am going to sentence him to a ten year sentence . . . in light of his comparative role with the others. . ." (Transcript of proceedings of June 15, 1988 at pages 25 and 33, respectively, reproduced at page 10a of the Appendix).

In the Court of Appeals, petitioners argued that the District Court's avowed reliance upon "a kilo a year" "rule of thumb" evinced a fixed, rigid approach to sentencing that offended the Due Process Clause of U.S. CONST.

Amend. V. Petitioners also contended that the sentencing judge's remark to the effect that the year per kilo rule was "not necessarily" being applied was too ambiguous to constitute an unequivocal disclaimer of the rule. Finally, petitioners asserted that the year per kilo rule, although articulated explicity only during the sentencing of the first-named defendant, VELEZ, was in all likelihood applied to each of them in what was effectively a joint sentencing proceeding.

Reasons For Allowing The Writ

This Petition presents the important constitutional question of whether, in a non-capital, federal criminal case, a sentencing judge is, as a matter of substantive due process, obligated to fashion and impose a sentence that fairly reflects individualized considerations and that is not determined on the basis of, or influenced by, fixed or rigid policies or *per se* rules.

In *Gardner* v. *Florida*, 430 U.S. 349 (1977) this Court was plain in noting that at least in a capital case, the sentencing process "must satisfy the requirements of the Due Process Clause", 430 U.S. 349, 359, and that a criminal defendant has a strong and constitutionally cognizable interest in "the character of the procedure which leads to the imposition of sentence", 430 U.S. 349, 359. Since it is clear, therefore, that due process is implicated at the sentencing stage in a criminal case, this Court should define the extent to which due process requires the individualization of sentences in non-capital cases.

That individualization of sentencing is grounded in the Constitution cannot seriously be disputed. In *Woodson* v.

North Carolina, 428 U.S. 280 (1976), this Court, while acknowledging "the prevailing practice of individualizing sentencing determinations" as a reflection of "enlightened policy" concluded that at least in a capital case, only the Eighth Amendment required individual consideration of the offender.[2]

If capital criminal defendants derive constitutional protection at the sentencing stage from both the Due Process Clause of the Fifth Amendment—which requires that a sentence be fairly determined—and from the Eighth Amendment—which reflects our "fundamental respect for humanity", *see, Woodson* v. *North Carolina,* 428 U.S. 280, 305 (1976), *supra,* then criminal defendants who, with ever-increasing frequency, face the prospect of spending significant portions of their lives, if not their entire lives, in prison, should enjoy the protection that the Due Process Clause contemplates.

The Court discerned precisely this due process issue on a prior occasion, but declined to reach it in *Dorszynski* v. *United States,* 418 U.S. 424, 432 (1974) n. 7, because no due process claim had squarely been presented there. In the instant case, Petitioners contend, as they did in the Court below, that when the sentencing judge announced a year per kilo rule, they were deprived of both a fair exercise of the Court's discretion and due process under U.S. CONST. Amend. V.

The Court should reach this question now, at a time when the sentencing process is undergoing vast change and is being subjected to great scrutiny.

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2. Other decisions of this Court make reference to individualizing the sentencing determination (*see, Williams* v. *New York,* 337 U.S. 241 (1949)), but none that we are aware of requires individualization as a matter of due process under the Fifth Amendment.

Conclusion

It is respectfully submitted that Petitioners' Joint Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
January 26, 1989

Respectfully submitted,

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APPENDIX

APPENDIX

Order of Court of Appeals—Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of November, one thousand nine hundred and eighty-eight.

Present:

HONORABLE LAWRENCE W. PIERCE,
HONORABLE GEORGE C. PRATT,
Circuit Judges,

HONORABLE KENNETH CONBOY,
*District Judge.**

ORDER

88-1261, 88-1262, 88-1268, 88-1269

UNITED STATES OF AMERICA,
Appellee,

v.

HECTOR FABIO VELEZ, JOHNNY VELEZ-POSSO, JOSE GUEVARA-BAUTISTA, IRLANDA GUEVARA, FAROUK HERNANDEZ, JR.,
Defendants,

HECTOR FABIO VELEZ, JOHNNY VELEZ-POSSO, JOSE GUEVARA-BAUTISTA, FAROUK HERNANDEZ, JR.,
Defendants-Appellants.

* Hon. Kenneth Conboy, of the United States District Court for the Southern District of New York, sitting by designation.

Hector Fabio Velez, Johnny Velez-Posso, Jose Guevara-Bautista, and Farouk Hernandez, Jr. appeal from judgments of conviction entered on June 15, 1988 in the United States District Court for the Eastern District of New York, *Platt, Ch. J.*, after each defendant pleaded guilty on February 22, 1988, to one count of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(C), 846.

Prior to sentencing, Chief Judge Platt conducted a joint hearing pursuant to *United States v. Fatico,* 579 F.2d 707, 711-14 (2d Cir. 1977), in which he reviewed and resolved most of the disputes over the contents of the defendants' presentence investigation reports. Judge Platt reserved judgment with respect to some of the disputed material until he could review the transcript of the proceedings. On June 15, 1988, after hearing argument on the remaining issues, he sentenced the four defendants to terms of imprisonment ranging from ten to twenty years. In addition, each defendant was required to pay a $50 mandatory special assessment.

On appeal, defendants Hector Fabio Velez and Farouk Hernandez, Jr. claim that they were sentenced on the basis of materially false information, in violation of Fed. R. Crim. P. 32(b); defendants Johnny Velez-Posso and Jose Guevara-Bautista claim that the district court failed to made [sic] adequate, clear and unambiguous findings of fact with respect to controverted matters in violation of Fed. R. Crim. P. 32(c)(3)(D); and, finally, all four defendants dispute the fairness and propriety of their sentences, claiming that the district court used a fixed and mechanistic approach in determining the four sentences imposed, in

violation of their due process and equal protection rights. After reviewing the transcript of the sentencing proceedings, we cannot say that the judge's factual findings with respect to each of the controverted matters were either clearly erroneous or insufficient to satisfy the requirements of Rule 32(c)(3)(D). The district judge fairly and fully addressed each claim raised by the defendants during the *Fatico* hearing and at sentencing. Since the district judge's findings were not clearly erroneous, the sentences he imposed were not based on "materially false information" in violation of Rule 32(b). Nor do we believe that the district judge's sentencing of the four defendants either violated their due process rights or constituted an abuse of the court's discretion. Rather, the sentences imposed fairly reflected the differing degrees of each defendant's participation in the crime charged. Accordingly, we affirm the judgments of conviction. *See United States v. Lee,* 818 F.2d 1052, 1058 (2d Cir.), *cert. denied,* 108 S. Ct. 350 (1987).

Since it does appear, however, that the presentence investigation reports contain errors which were not deleted pursuant to the district court's order, we remand this case to the district court for the limited purpose of having a record of the sentencing proceedings attached to the presentence investigation reports, or for other appropriate action. *See United States v. Cortez,* 841 F.2d 456, 461 (2d Cir.), *cert. denied,* 108 S. Ct. 2829 (1988). We have considered all of the defendants' arguments and find them to be without merit.

The judgments of the district court are AFFIRMED, and we remand to the district court for attachment of the

record of the sentencing proceedings to the presentence investigation reports.

s/ LAWRENCE W. PIERCE

HONORABLE LAWRENCE W. PIERCE

s/ GEORGE C. PRATT

HONORABLE GEORGE C. PRATT
Circuit Judges

s/ KENNETH CONBOY

HONORABLE KENNETH CONBOY
District Judge

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Superseding Information

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Cr. No. 87 Cr. 751(s)(TCP) (T. 21, U.S.C., §§ 841(a)(1), 841(b)(1)(C))

UNITED STATES OF AMERICA,

against

HECTOR FABIO VELEZ, JOHNNY VELEZ-POSSO, JOSE GUEVARA-BAUTISTA, and FAROUK HERNANDEZ, JR.,

Defendants.

THE UNITED STATES ATTORNEY CHARGES:

On or about and between September 25, 1987 and October 31, 1987, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants HECTOR FABIO VELEZ, JOHNNY VELEZ POSSO, JOSE GUEVARA-BAUTISTA, and FAROUK HERNANDEZ, JR., and others did knowingly and intentionally conspire to distribute and possess with intent to distribute cocaine, a Schedule II narcotic drug controlled substance, in violation of Section 841(a)(1) of Title 21, United States Code.

(Title 21, United States Code, Sections 846 and 841(b)(1)(C)).

By: Illegible

Acting United States Attorney
Pursuant to 28 C.F.R. § 0.131

ANDREW J. MALONEY
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Excerpts from Transcript of Sentencing before the Honorable Thomas C. Platt United States District Judge

CR 87-751

United States Courthouse Brooklyn, New York

June 15, 1988 9:30 o'clock a.m.

UNITED STATES OF AMERICA,

v.

HECTOR VELEZ,

Defendant.

APPEARANCES:

For the Government:

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United States Attorney
By: KEVIN O'REGAN
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For the Defendant:

ROBERT LEIGHTON, ESQ.

Court Reporter:

Sheldon Silverman
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(718) 330-7687

* * *

You're dealing with a person who pled guilty to dealing with 50 kilos of cocaine. My normal rule of thumb which is just a rule of thumb, dosen't necessarily mean in this case, is a kilo a year. That would bring him to 50 years automatically....

* * *

... In his case I'm going to accept the Government's recommendation, give him 20 years....

* * *

(Whereupon this matter was concluded for this date.)

Excerpts from Transcript of Sentencing before the Honorable Thomas C. Platt United States Chief Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CR-87-751

United States Courthouse Brooklyn, New York

June 15, 1988 9:30 o'clock a.m.

UNITED STATES OF AMERICA,

vs.

JOHNNY POSSO, JOSE BATTISTA-GUEVARA, FAROUK HERNANDEZ,
Defendants.

APPEARANCES:

For the Government:

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United States Attorney
Eastern District of New York
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BY: KEVIN O'REGAN, ESQ.
Assistant U.S. Attorney

For the Defendants:

BY: ROGER SCHWARZ, ESQ.
BARRY ASNESS, ESQ.
MORTON KATZ, ESQ.

Court Reporter:

SUE GHORAYEB, RPR

* * *

The Court:

* * *

. . . I am going to impose a 15-year sentence on him, plus $50 special assessment, in view of the huge quantity of cocaine.

* * *

The Court:

* * *

. . . I am going to sentence Mr. Battista to 12-year prison term plus $50 special assessment in light of the crime he committed.

* * *

The Court: In any event, I am going to sentence him to ten year sentence plus a $50 special assessment in light of his comparative role with the others.

* * *

(Sentencing concluded)